83-514

Office-Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY
CIVIL ACTION NO. 7571-G

ELIZABETH JANE HALL — PLAINTIFF

VS:

MOTION TO REOPEN ON THE BASIS OF NEWLY DISCOVERED EVIDENCE AND FRAUD

UNITED STATES OF AMERICA,
THOMAS P. McHUGH, ELMER SNYDER
AND DONALD POWERS — DEFENDANTS

Comes Elizabeth Jane Hall, Plaintiff herein, by and through the undersigned counsel, and persuant to Federal Rule of Civil Procedure 60(b)(2), respectfully moves this Honorable Court to reopen this case on the basis of newly discovered evidence and on the basis that Defendants have perpetrated a fraud upon this Honorable Court and upon your Plaintiff.

The Court will recall that this litigation has been on the court's docket for 10 years. The case has been argued twice before the Supreme Court of the United States and twice before the United States Court of Appeals for the 6th Circuit, with a third appeal on relate' issues now awaiting oral argument.

The thrust of the arguments by the Internal Revenue Service, and its agents, has been, and is, the Defendants were acting in good faith.

Subsequent to this Court entering its last order dismissing the last Defendants, Plaintiff has learned through actions taken in a highly similiar case in the U.S. District for the North-

western District of Alabama, that there exists proof that the Internal Revenue Service knew that they were not following their own procedures when they filed a jeopardy tax assessment against Mrs. Hall. Seibert v. Baptist

The Justice Department has essentially claimed that tax court and suits for refund are adequate protection against abusive and/or malicious assessments and seizure. This proposition has now been addressed in Rutherford v. United States, 702 F 2d 580 (5th Cir., 1983), and has been soundly rejected.

Because of the incorrect presumption of correctness and good faith with which the Appellate Court has shielded the Defendants, it is necessary to look to the Internal Revenue Manuals governing the procedure in July of 1972 for the termination assessment of Petitioner. The termination of a year and the amount of the tax assessment are interdependent. They cannot be considered separate and independent from each other. In other words, if the amount of the tax assessment is unreasonable, then the termination cannot be approved even if the taxpayer satisfies other conditions (4585.2 of I. R. Manual). The manual procedures referred to herein were unknown to Plaintiff until after the court dismissed all Defendants. Plaintiff believes these manual pages (appended as Appendix A), warrant reopening of the case both on grounds of newly discovered evidence and as fraud on the part of the Defendants for never making these provisions known to Plaintiff or to the trial and appellate courts. These manual excerpts clearly show that they violated their own known procedural guidelines. Plaintiff will further attempt to show the Court that they did so deliberately. The "tax assessment" was unreasonable from the subjective view of the Defendants. I.R.

Manual 4585.2 Procedure for Terminating Tax Period (Appendix A) requires that the tax assessment be equal to the ultimate tax liability for the terminated period and requires the amount and the termination be personally approved by the District Director; (3) of 4585.2 holds prima facie the unreasonableness of an assessment equal to the amount of money or other valuable property held by a person at time of arrest unless supported by other facts. The Defendants knowingly violated their own rules.

In the present case, the Acting Director, Thomas McHugh, (not the director) knowingly terminated Petitioner's tax year on an assessment many times greater than the amount of property or money of Plaintiff. Additionally, the amount of the ultimate tax liability of the Petitioner was thousands of dollars less than claimed by I.R.S. Moreover, under I.R. Manual 4584.8, immediate review was required, together, with a warning that the proper notices should be sent. No notice was sent Mrs. Hall, and no effort was made by any of the Defendants to abate the tax assessment, even though it was obviously excessive.

The immediate review and issuance of the 90 day letter was required under I.R. Manual. The I.R.S. claimed that issuance of the 90 day letter (statutory Notice of Deficiency), was not required pursuant to assessments made under I.R.C. § 7851. Until Laing and Hall v. United States, 423 U.S. 161 (1976), Defendants claimed that the I.R.S. and its agents did not understand they were required to give a Notice of Defnciency. However, that was not the case, because the Justice Department's position was based on an intentional misrepresentation to the United States Supreme Court. The facts which were known to I.R.S. was that

the issuance of the 90 day review letter was required within 60 days from the date of the assessment. Unlike I.R.S. contends, the subjective test would hold them accountable for the knowledge of Internal Revenue Manual 4585.1 Termination of Taxable Period under I.R.C. S 6851 and I.R. Manual 4584.8 Immediate Review and Issuance of 90 Day Letters (see Appendix A).

As stated supra, the termination and amount were unreasonable. Now, through the assistance of I.R.S. agents, using the same facts known to the Defendants, we shall objectively see whether the "tax assessment" and termination were unreasonable.

Audit Field Agent Dudley M. Weathers reviewed I.R.S. documents and I.R. Manuals as they applied to the Petitioner. In Seibert v. Baptist, he determined the assessment to be unreasonable by I.R.S. accounting and I.R. Manual procedures (Appendix B).

In Siebert v. Baptist, I.R.S. Agent James Pertree, an agent of 32 years service, attested, among other things to the procedure under the improper program whose policies were "set by the District Director", D.T. Baptist. Even under the "program standards", Mr. Pertree would not have recommended the termination and the "tax assessment" on the strength of Agent Larry Hyatt's alleged facts. The responsibility to review the reasonableness of the termination was the Director's. In addition to I.R. Manuals, C. Michael Siebert of Siebert v. Baptist, has personally informed Petitioner that he has located agents who will attest to the requirement that the Notice of Deficiency was required within 60 days of termination. However, the I.R. Manual are so clear on that point, they need little amplification (see I.R. Manual 4584.8, Appendix A), (affidavit - Appendix C).

The program (which was applied to Petitioner) was to improperly use termination assessment and seizure powers of I.R.S. to maliciously prosecute and harass persons selected for that treatment because they were believed to belong to a certain class of taxpayers. The program had two main objectives. One was to seize the assets of persons arrested to prevent them from making bond and hiring counsel (hinder the defense of a criminal case, requiring additional expense to defend the tax case). Second was to "dry up assets" of alleged drug sellers. To make the program effective required an unreasonable assessment. The "tax assessment" was set high enough that it could not be satisfied. Setting the tax assessment beyond reasonable limits of the I.R. Manual precluded review by the Federal District Court through the implementation of 26 U.S.C. §7421 (a) Anti-Injunctive Statute. The only alternative is Tax Court. A condition precedent to Tax Court jurisdiction was the 90 day letter. Withholding the Notice of Deficiency (90 day letter) for over two years precluded Tax Court resolution of the tax assessment. Withdrawing the deficiency to prevent review was obviously not an adequate remedy for deprivation of rights and liberty and expenditure of attorney's fees caused by the malicious prosecution of a bad faith assessment. Rutherford v. Kuntz, 702 F.2d 580 (5th Cir., 1983).

The question of whether the use of assessment and seizure power of the Internal Revenue Service for any purpose other than legitimate revenue claims was proper was answered by Special Agent Thomas B. McWhorter. Mr. McWhorter stated in his affidavit at page 2 that the I.R. Manuals were disregarded for program purposes (see Appendix D). The letter at Appendix E shows a

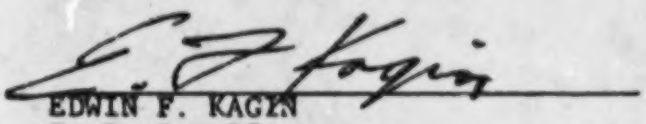
prosecutor dismissing the entire criminal case in the Alabama case that is parallel to Mrs. Hall's.

Plaintiff, Elizabeth Jane Hall, believes and alleges that a conspiracy existed to violate her constitutional rights. At the times this Honorable Court granted summary judgment, the attached I.R.S. Manuals, proving that known procedures were violated, were unknown to the Plaintiff. Further, the I.R.S. agents, whose affidavits are attached hereto and incorporated by reference as fully as if set out verbatim herein were unknown to Plaintiff. Upon information and belief, the individuals who supplied the affidavits will travel to the Western District of Kentucky to testify to the matters contained in their affidavits.

Plaintiff believes that she can show that a fraud was perpetrated on herself, her attorneys, and this Honorable Court by the I.R.S.. Agents of the I.R.S. maintained at all levels of this action that they had acted properly and in good faith. The appended I.R.S. Manual references which are attached hereto and incorporated as reference as fully as if set out verbatim herein show that the agents did in fact know they were acting improperly in Mrs. Hall's case. The affidavits show that there was a national policy of the I.R.S. to ignore and flaunt their own rules. This coupled with the fact that Judge Allen of this District had enjoined identical behavior in the Rambo case only months before, lend great credence to Mrs. Hall's argument that conspiracy and fraud was, and still is, present. For the reasons above stated, Plaintiff, Elizabeth Jane Hall, respectfully moves this Honorable Court to reopen her case so

that she may pursue the newly discovered evidence that has only now come to the attention of she and her counsel.

Respectfully Submitted,



EDWIN F. KAGIN
P. O. Box 77
Pewee Valley, KY 40056
(502) 241-5554
Attorney for Plaintiff

CERTIFICATE

This is to certify that a true copy of the foregoing Motion to Reopen on the Basis of Newly Discovered Evidence and Fraud has been mailed, postage prepaid, on this 17th day of October, 1983, to:

HON. GLENN L. ARCHER, JR.
HON. MICHAEL J. ROACH
Assistant Attorney General
Tax Division, Department of Justice
Washington, D.C. 20530

HON. RONALD E. MEREDITH
United States Attorney
U.S. Courthouse
600 West Broadway
Louisville, KY 40202

HON. WILLIAM JOHNSON
JOHNSON & JUDY, Attorneys
326 West Main Street
Frankfort, Kentucky 40601

HON. JAMES GORDON, Judge
United States District Court
Western District of Kentucky
U.S. Courthouse
600 West Broadway
Louisville, KY 40202

EDWIN F. KAGIN

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Office for review.

4585 Termination Of Taxable Period Under IRC 6851

4585.1 STATUTORY BASIS

(1) IRC 6851 specifically applies when the taxable year of a taxpayer has not ended, and also when the taxable year has ended but the due date for filing the return has not arrived.

(2) Assessments under IRC 6851 are not in a technical sense jeopardy assessments. Nevertheless, the review procedures in IRM 4584.8 relating to jeopardy assessments apply also to assessments under IRC 6851, except with respect to departing aliens (see IRM 4299).

(3) IRC 6658 provides that, in addition to all other penalties, a penalty of 25 per centum of the total amount of the tax or deficiency in tax, may be added as a part of the tax for violations or attempts to violate the provisions of IRC 6851.

4585.2 PROCEDURES FOR TERMINATING TAXABLE PERIOD

(1) Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments. They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore, a termination of taxable year and assessment must be personally approved by the District Director or the Director of International Operations. Prior approval must be secured from the Director, Audit Division (CP:A:P), if none of the following conditions exist:

(3) An assessment made as a result of termination of taxable period must be based on a reasonable computation of tax liability. An assessment equal to the amount of money or other valuable property held by a person at the time of arrest is not considered a reasonable computation unless supported by other facts.

(4) A recommendation that the 25% penalty provided by IRC 6658 be added to the tax must be based on the fact that the taxpayer performed, or attempted to perform, an act or acts tending to prejudice or to render wholly or partially ineffectual proceedings to collect income tax made due and payable by virtue of IRC 6851. (See Rev. Rul. 68-96, C.B. 1968-1, 566.)

(5) The basis on which the adjusted gross income was computed will be stated. This will be an acceptable legal basis (for example, a source and application of funds statement or net worth computation). All known assets, liabilities, income and expenses will be considered. A reasonable estimate will be made of expenses, if appropriate, as for

Accounting and Research Division, for jeopardy assessment. After assessment has been accomplished, the service center returns the file with the two copies of Form 2644 to Review Staff for further administrative action. The original Forms 2644 and 2645 are retained by the service center.

(5) Quick assessments may be requested using Form 2859 (Request for Quick or Prompt Assessment). Form 2859 is usually prepared in quadruplicate. Original and one copy are sent to the service center, one copy is retained by preparer, and in bankruptcy cases one copy is sent to Special Procedures Staff in Collection Division. (See IRM 4583.2.)

(6) Telephone requests for jeopardy or quick assessments may be made to the service center when warranted. (See ADP Handbook 342-738.03(6) for service center procedure.) Such telephone requests must be followed promptly with properly approved Forms 2644 or 2859, as appropriate. When a jeopardy or quick assessment is requested by telephone, the following information must be furnished:

(a) Affirmative statement in jeopardy case that District Director has approved Form 2644.

(b) Name, address, and EIN or SSN of taxpayer.

(c) Type of tax.

(d) Taxable period.

(e) Amount of tax, penalty, and interest to be assessed.

(f) Amount of payment, if any, and balance due.

4584.8 IMMEDIATE REVIEW AND ISSUANCE OF 90-DAY LETTERS

(1) Immediately after assessment, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.

(2) Jeopardy assessments made by the Office of International Operations will be immediately reviewed by the National Office Audit Division, (CP:A:P).

(3) The purpose of this review are:

(APPENDIX A)

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STATE OF ALABAMA

COUNTY OF MADISON

AFFIDAVIT

Before the undersigned Notary Public personally appeared Dudley M. Weathers who, first being by me duly sworn, did depose and state as follows:

My name is Dudley M. Weathers. I am of legal age and a bona fide resident citizen of Huntsville, Alabama.

I was employed by the Internal Revenue Service from 1972 to 1980 during which time I held the following positions for the periods shown:

from 10-30-72 to 7-5-75	Internal Revenue Agent, National Office, Income Tax Division, Ruling Group
from 7-6-75 to 1-12-80	Internal Revenue Agent, Birmingham District, Audit Division, Huntsville Audit Group

At the request of Carl Michael Seibert, I have examined a number of documents and Internal Revenue Service Manuals which were in effect during the 1972 tax year. These IR Manuals relate to the termination assessments under IR Code § 6851. I have also reviewed the letter which was apparantly sent by Larry R. Hyatt, Group Supervisor, Birmingham Group Intelligence Division, on July 10, 1972 and computation attached thereto. The letter contains no information upon which a reasonable or collectible computation could be based. In essence, the letter states that on July 7, 1972 Mr. Seibert was charged with possession of 1090 L.S.D. blotters, that an informer established that the value of the L.S.D. was $.30 each and that it sold for $1.50 each, and that at the time of his arrest for possession of L.S.D., Mr. Seibert had $2,712.01, a 1969 Oldsmobile 442 and a bank account at Henderson Bank. Mr. Seibert's gross income for the period in question was computed to be $25,930.00 based on the information supplied by the Huntsville Police Department and an informant. Taxes in the amount of $6,458.00 were assessed by the IRS. The letter is absent any direct testimony of personal knowledge

(APPENDIX B)

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of drug sales. Absent some basis other than hearsay evidence, there is not a reasonable basis upon which any of this assessment can, or could be, justified.

In reviewing the figures attached to the letter, I have determined that they are not supported by the evidence in the letter, nor would I, as a Field Agent, have calculated such an assessment. In this assessment, the Internal Revenue Service could not, by standards I am acquainted with, have prevailed in any forum absent the presence of larger unexplained assets or more evidence. Under the information presented by Mr. Hyatt's letter and values of the property as provided by IRS documents, Mr. Seibert's tax for January 1, 1972 through July 7, 1972 would have been more reasonably calculated based on the increase in net worth as follows:

$ 2,712.01	(cash)	1090	LSD blotters
327.00	(blotters)	x .30	cost
50.00	(guitar)	$ 327.00	
550.00	(car)		
97.67	(bank account)		
6.00	(apparently found in auto)		
$ 3,742.68	Net Worth Increase (unless otherwise demonstrated that property was acquired prior to January 1, 1972)		
255.00	Tax on the Net Worth Increase		
19.13	Self-employment tax (7.5%)		
$ 274.13	Total Tax		

Based on the information available to me, the assessment should have been computed using the above figures. It appears the assessment in Mr. Seibert's case was unreasonable.

Dudley M. Weathers

Sworn to and subscribed before me this 1st day of February, 1982.

Notary Public

Best Copy Available

STATE OF ALABAMA

COUNTY OF MONTGOMERY

AFFIDAVIT

I, James Pertree, after being first duly sworn, do depose and say the following:

In the early 1970's the Internal Revenue Service came out with a program to get the money out of drug seller's hands. The main affect of this program was to stop them from buying more drugs, to prevent them from making bond when arrested and from hiring expensive attorneys. Agents and Special Agents of the Internal Revenue Service were selected in Huntsville, Birmingham, Montgomery and Mobile, Alabama to be on a standby basis night and day for a call from a police department that had made an arrest for the sale of drugs. I was called down to the Montgomery City Police Department about 10 times. On each case, an undercover policeman had bought some type of illegal drugs. When I arrived at the police department, the money would be on a table and the drug seller was in the County Jail. I would talk to the undercover policeman who bought the drugs. From that information received pertaining to the drug seller, I made a computation of income tax plus penalty and self-employment tax that would at least equal the cash on the table. As an audit agent, I wrote a report and then either I or a Special Agent would call a Collection Officer and he and I went and talked to the drug seller while he was still in jail. I would talk to him to get any information pertaining to his drug selling and/or his net worth. I would tell the drug salesman he owed "X" number of dollars of tax and would explain to him what I did and ask him if he wanted to pay the tax.

Plaintiff's Exhibit #1

(APPENDIX C)

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They always said "No". The Collection Officer would then serve a lien on the taxpayer and city for all the money on the table and his car. I had 24 hours to get my case to Birmingham to the District Director who had been called before each of my assessments.

The policy of this program was set by the District Director, Dwight T. Baptist, and was communicated within the Internal Revenue Service by every way possible - oral and written, from many people. I do not have any of those memos because when an agent retired, as I did in May of 1980 (after 32 years of service), he is supposed to leave that material with the IRS.

I have reviewed the letter of July 10, 1972 by Larry Hyatt which recommends termination of Carl Michael Seibert's 1972 tax year. I have never seen any termination assessment made when there were no sales charges against the taxpayer or a police officer could not personally attest to sales by that person. I would not have made a termination in Mr. Seibert's case unless the police officer could have provided more than what appeared to be hearsay. I would have asked to talk to someone who personally knew of drug sales.

James Pertree
James Pertree

Sworn to and subscribed before me this 27th day of January, 1982.

Margaret G. Mark
Notary Public

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The program consisting of the termination of taxable years involving persons arrested for alleged drug violations was mainly to cooperate with local law enforcement agencies and to assist in the drug enforcement program by seizing funds and assets belonging to violators. This was done, as I understood it from my supervisors, to dry up the drug traffic.

As I recall, during this period not too much attention was paid to Manual procedures involving drug law violators, but the main thrust was to tie up funds and assets seized.

Thomas S. McWhorter

Thomas S. McWhorter

Sworn to and subscribed before me on this 13th day of July, 1981.

Virginia A. Flores

Notary Public

Comm. expires 8-3-81

(APPENDIX D)

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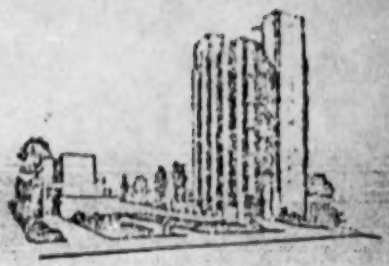
CITY OF HUNTSVILLE

GOVERNED BY MAYOR AND CITY COUNCIL

CHARLES H. YOUNGER
City Attorney
E. CANTEY COOPER
Asst. City Attorney
ROY W. MILLER
Asst. City Attorney

P.O. BOX 308
HUNTSVILLE, ALABAMA 35804
★
PHONE: 532-7301



CITY OF HUNTSVILLE MUNICIPAL BUILDING

November 18, 1981

Ms. Norma Jean Robbins
Admissions Secretary
Alabama State Bar
415 Dexter Avenue
P.O. Box 671
Montgomery, Alabama 36101

Dear Ms. Robbins:

During the years of 1972 to 1979 I prosecuted criminal cases for the Madison County District Attorney's Office. Sometime during the scope of my employment there I was assigned a felony case to try against Carl Michael Seibert. After I received the case I interviewed witnesses and worked the case up for possible prosecution. After doing so I made the determination that there was no merit to the prosecution of said case. A request was made by myself to the District Attorney to reassign the case to someone else for them to make an impartial and separate consideration. Without rechecking with the District Attorney's Office to see the outcome, it is my recall that said case was, in fact, dismissed after review by another member of their staff.

After the dismissal and for some three to five years thereafter, I got to know Carl Michael Seibert on a social basis. He highly impressed me as a very intelligent, industrious, and capable individual. It is my opinion that he would make an excellent attorney and should be given all consideration directed toward that end result. Therefore, I respectfully submit that if possible you certify him as a law student in good standing.

Sincerely yours,

Roy Wesley Miller

Roy Wesley Miller

RWM/bab

(APPENDIX E)